

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6095

Complaints of Philip Goodman, John H. Macomber,)
Peter J. Belli and Dale Carman, and all other persons)
similarly situated, vs. Central Vermont Public Service)
Corporation Re: charges for electric service

Order entered: 1/11/2005

ORDER ON MOTION TO DISMISS

I. REPORT AND RECOMMENDATION

On November 9, 2004, the petitioners filed a request that this docket be dismissed. On November 12, 2004, Central Vermont Public Service Corporation ("CVPS") filed its concurrence with this motion and further requested that this docket be dismissed with prejudice. The Vermont Department of Public Service did not file a response to the petitioners' request, and the petitioners did not file a response to CVPS' request that the docket be dismissed with prejudice. For the reasons set forth below, I recommend that this docket be dismissed, with prejudice.

In this docket, the petitioners raised concerns about the appropriateness of CVPS charging commercial rates to condominium owners. The core issue was resolved in Docket No. 5835 when the Board determined as reasonable CVPS' proposal to assign customers to different rate classes on the basis of whether the customer(s) are subject to the Vermont Rooms and Meals Tax.¹ However, two issues presented by the petitioners in this docket were not addressed in Docket No. 5835: whether CVPS' charges to different classes of customers under tariffs in effect prior to the decision in Docket No. 5835 were appropriate; and whether the four-named petitioners could "represent all other persons similarly situated" in connection with CVPS actions prior to the decision in Docket No. 5835.²

1. Docket No. 5835, Order of 4/5/96 at 3 and 5, *aff'd* 167 Vt. 626 (1998).

2. Docket No. 6095, Order of June 1, 1998.

Over the course of this docket, both the petitioners and CVPS have made several requests relating to the nature of the relief sought in the petition as well as discovery. Despite rulings made on many of these requests, and rulings made concerning the parties' filings of responses to each others' discovery requests, this matter has not yet reached readiness for an evidentiary hearing because the petitioners have not been diligent in prosecuting their case.

At the January 29, 2003, status conference, the petitioners represented that they had not moved forward with this case since January 1999 because they were waiting for a ruling on the class action issue. However, that assertion is without merit, because the December 9, 1998, Order in this docket specifically stated:

In addition, I noted [at the December 8, 1998, status conference] that factual information may come forward during evidentiary hearings in this docket relevant to resolution of the Motion of CVPS to Dismiss Portions of Petitioners' Complaint Seeking Compensatory Damages, Punitive Damages, Penalties, Attorney's Fees, Costs And Certification as a Class Action. Accordingly, ruling on that motion was deferred.³

Thus, the petitioners were on notice since December 8, 1998, that no ruling on the CVPS motion, including the class action issue, was contemplated until after the presentation of evidence in this case. The petitioners never objected to this determination about the timing of ruling on the class action issue (nor did they even comment upon it until the January 29, 2003, status conference).

There has been more than adequate time for the petitioners to move forward on the issues presented in this case, yet, they have not done so. The petitioners now have chosen to request that this docket be dismissed. CVPS has concurred with the petitioners' request for dismissal and has asked that this case be dismissed, with prejudice. No objections to dismissal of this matter, with prejudice, have been filed. For all these reasons, I recommend that this docket be dismissed, with prejudice.

The foregoing is reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

3. Order of December 9, 1998, at p. 2.

Dated at Montpelier, Vermont, this 4th day of January, 2005.

s/Judith M. Kasper

Judith M. Kasper
Hearing Officer

II. BOARD DISCUSSION

The petitioners have filed an objection to the Hearing Officer's recommendation that this matter be dismissed with prejudice.⁴ The petitioners assert that their motion to dismiss was drafted in such fashion so as to preclude statement of a specific reason for dismissal of this docket.⁵ The petitioners also accuse the Hearing Officer and the Department of dealing with the petitioners in an unfair manner that thereby prevented the petitioners from receiving the class action relief they requested in their petition. We have reviewed the record and the petitioners' contentions. Based on our review, we conclude that the petitioners have mischaracterized the record in this docket, and we accept the recommendation of the Hearing Officer.

We first address petitioners' contention that the Board is precluded from stating a specific reason for dismissal of this case.⁶ In Board proceedings, V.R.C.P. 41(2) governs voluntary dismissal requests made at any time after the respondent has filed a response to a petition.⁷ CVPS filed its response to the petition on July 2, 1998.⁸

V.R.C.P. 41(2) provides:

an action shall not be dismissed at the plaintiff's instance save upon order
of the court and upon such terms and conditions as the court deems proper . . .

In response to Petitioners' Motion to Dismiss, CVPS filed a request that the matter be dismissed with prejudice. The petitioners did not file an objection or other response to CVPS's request. The Hearing Officer appropriately considered the petitioners' motion to dismiss in conjunction with CVPS' request that the docket be dismissed with prejudice. Moreover, there is nothing inherent in the petitioners' motion to dismiss that would preclude dismissal of this matter with

4. Complainants' Memorandum in Opposition to Proposed Order of Dismissal, 12/14/04.

5. *Id.* at 1.

6. *Id.*

7. Public Service Board Rule 2.103; V.R.C.P. 41(a)(1) and (2).

8. Motion of Central Vermont Public Service Corporation to Dismiss Portions of Petitioners' Complaint Seeking Compensatory Damages, Punitive Damages, Penalties, Attorney's Fees, Costs and Certification as a Class Action, dated June 30, 1998.

prejudice. The petitioners do not cite to any statute, rule, or procedure that would require issuance of a dismissal order in the form they assert to be proper,⁹ nor are we aware of any.

We further concur in the Hearing Officer's assessment that the petitioners have not been diligent in prosecuting their case. The petitioners have asserted that their failure to move forward with their case, and their failure to follow through with providing answers to discovery requests, was, in part, due to the fact that the class action issue had not been decided.¹⁰ However, on June 23, 1998 (i.e., one week after the prehearing conference in this docket), the Hearing Officer issued the following Order:

Further consideration of Petitioner's assertion that this matter should be treated as a class action shall be by way of a written motion by the Petitioners that clearly defines the characteristics of the members of the class, and is supported with an appropriate memorandum of law . . .¹¹

The petitioners never filed such a motion, nor sought reconsideration or Board review of that Order. Thus, if the petitioners wanted to pursue their claim as a class action, it was their responsibility to make a motion with a supporting memorandum of law. They did not do so.

The petitioners also state that it is "inexcusable" for this matter to be dismissed with prejudice on the grounds that they failed to provide discovery concerning certain Killington records because there was no specific order compelling the petitioners to provide this particular information.¹² However, the Hearing Officer's recommendation does not rest specifically on the petitioners' failure to provide discovery, but instead on general inaction by petitioners in moving their case forward.¹³

9. Complainants' Memorandum in Opposition to Proposed Order of Dismissal, 12/14/04 at 1.

10. Tr. 1/ 29/03 at 9 and 17-18.

11. Prehearing Conference Memorandum and Scheduling Order, 6/23/98 at 2.

12. Complainant's Memorandum in Opposition to Proposed Order of Dismissal at 2-3.

13. The absence of a response by petitioners to CVPS' discovery request for the Killington records does provide an example of the petitioners' lack of action in this matter. The record in this docket shows that the Hearing Officer set December 28, 1998, as the deadline for the petitioners to respond to CVPS' discovery requests. Tr. 12/8/98 at 42; Procedural Order of 12/9/98 at 2. The record also shows that no party complained or otherwise notified the Board that there was need for further Board action concerning discovery until the January 29, 2003, status

Considering all of these circumstances, we conclude that the Hearing Officer's recommendation to dismiss this case with prejudice is reasonable, and we adopt it.

We now turn to the petitioners' general accusation that they have been treated unfairly in this proceeding by the Hearing Officer and the Department. We see no indication in the record of this docket that the petitioners were prevented from moving forward with their case because there was unlawful bias against them. The petitioners assert that the Hearing Officer was unwilling to certify this case as a class action and that she thereby made it "clear that a fair hearing was unlikely to be held."¹⁴ The fact that the Hearing Officer did not certify this matter as a class action is not an indication of unlawful bias. Rather, as discussed above, the petitioners were given a clear opportunity to file a motion that this matter be certified as a class action, as well as the opportunity to present evidence on that issue at the evidentiary hearing. They did not do so.¹⁵

The petitioners also asserted that there was prejudice against them because they are non-resident second home owners, as evidenced by the fact that the Department chose to "take no position" in this docket.¹⁶ The petitioners fail to cite any support in the record for this claim, nor

conference. At that time, the petitioners still had not provided the Killington records requested by CVPS. Tr. 1/29/03 at 9.

14. Complainant's Memorandum in Opposition to Proposed Order of Dismissal at 2.

15. The petitioners also stated that the Hearing Officer meant to "harass counsel" and had "no intention of giving the Complainants a fair hearing" because, they assert, she accused counsel for the petitioners of violating the Rules of Professional Conduct. Complainant's Memorandum in Opposition to Proposed Order of Dismissal at 2. The record in this case simply does not support these contentions. On June 30, 1998, an Amended Complaint was filed which included counsel for the petitioner, Melvin B. Neisner, Jr., as a new named petitioner. At the September 24, 1998, status conference, the Hearing Officer inquired whether each of the other named petitioners knew and understood that Mr. Neisner had been included as a named petitioner in the case. Mr. Neisner asked why that question was relevant, and the Hearing Officer responded that there "may or may not be" sections of the code of Professional Responsibility that applied to that situation. As the Hearing Officer continued by saying that she "had no problem with it," Mr. Neisner interrupted her, stating: "I withdraw it. I withdraw myself as a petitioner, assuming you're going to be filing a complaint against me or Mr. Silver or perhaps Mr. Commons, I will orally do it, and I will send in a memo this afternoon." Tr. 9/24/98 at 17-19. The record shows that the only comment concerning a professional conduct complaint came from Mr. Neisner himself, and that the Hearing Officer made an impartial, appropriate inquiry of counsel as part of her responsibility to see that the Board proceeding was being conducted consistent with relevant rules of practice. See Rules of Professional Conduct, Rule 3.7 and Rule 1.7(b).

16. Complainant's Memorandum in Opposition to Proposed Order of Dismissal at 3.

have we found any such support. Likewise, there is no indication in the record of this docket that the Department has in any way precluded the petitioners from moving forward with their claim(s).

In sum, what is clear is that the petitioners seek to shift the responsibility to the Hearing Officer and the Department for the petitioners' own inaction in prosecuting their case, inaction which continued as recently as the absence of a filing in opposition to CVPS' request that this matter be dismissed with prejudice.

III. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The recommendation of the Hearing Officer is accepted.
2. This docket is dismissed, with prejudice.
3. This docket shall be closed.

Dated at Montpelier, Vermont, this 11th day of January, 2005.

s/Michael H. Dworkin)
)
s/David C. Coen)
)
s/John D. Burke)

PUBLIC SERVICE
 BOARD
 OF VERMONT

OFFICE OF THE CLERK

FILED: January 11, 2005

ATTEST: s/Susan M. Hudson
 Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.